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No. 85-6461

In the Supreme Court of the United States

October Term, 1985

EARLINE MARTIN,
Petitioner,

vs.

STATE OF OHIO,
Respondent.

ON WRIT OF CERTIORARI
TO THE SUPREME COURT OF OHIO

RESPONDENT'S BRIEF ON THE MERITS

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QUESTION PRESENTED

Whether the Ohio legislature can constitutionally place the burden of proof upon the accused in a murder case to establish the affirmative defense of self-defense by a preponderance of the evidence, where the absence of self-defense is not an element of the crime charged.

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CONSTITUTIONAL AND STATUTORY PROVISIONS INVOLVED

The relevant constitutional and statutory provisions involved in this case are set out in the Appendix to this Brief at pp. A1-A6. Those being referred to are:

(1) United States Constitution—Amendment XIV.

(2) Constitution of the State of Ohio—Article I, Section 1.

(3) Revised Code of Ohio, §2903.01.

(4) Revised Code of Ohio, §2903.02

(5) Revised Code of Ohio, §2903.03.

(6) Revised Code of Ohio, §2901.05.

(7) Revised Code of Ohio, §2901.21 (A) & (C).

(8) Revised Code of Ohio, §2901.22.

STATEMENT OF THE CASE

Petitioner, Earline Martin, was indicted, tried and convicted of the crime of Aggravated murder, Ohio Revised Code §2903.01, with firearm specification. Petitioner's appeals to the Court of Appeals, Eighth Judicial District, and the Ohio Supreme Court, resulted in her conviction being affirmed.

STATEMENT OF THE FACTS

The State's evidence consisted of the testimony of fifteen witnesses which proved beyond a reasonable doubt that the petitioner, Earline Martin, was guilty of aggravated murder. The victim was Walter Martin, a seventy-three year old retired police officer and the petitioner's sixth and last husband. It was Mr. Martin's second marriage. During the duration of their marriage, in May of 1983, Mr. Martin was hospitalized for a heart attack and stroke (R. 437).

The testimony of several State witnesses established that this short-lived marriage was not harmonious. Delores Williams, Walter Martin's eldest daughter, testified that on July 18, 1983, she called petitioner to inform her Mr. Martin had temporarily moved into her Warrensville Heights apartment (R. 232). Earline Martin's reaction to the separation was as follows: *"Your father is not going to leave me again. I took my marriage vows seriously. I said. 'To death do us part' and that's what I meant"* (R. 232).

Narleen Brown, the granddaughter of Walter Martin, testified to a conversation with Earline Martin on the same day. Regarding Mr. Martin leaving her, petitioner specifi-

cally stated: "I'm going to tell you one thing, Nickie, bad luck will follow your daddy (grandfather) for the rest of his life," and hung up the phone (R. 289).

Gloria Oliver, the second daughter of Walter Martin, testified to a conversation with petitioner after the couple's first separation. Petitioner *confided in her, admitting that "Before I let your father make a fool of me again, I'll blow him away, Gloria Jean"* (R. 315). Gloria Oliver also called the petitioner's home on the morning of July 21, 1983, shortly after the victim's murder. In answer to her question as to what was wrong, the petitioner said: "Gloria Jean, I'm tired of fighting with your father" (R. 318).

The State further offered the testimony of Mr. Anthony LaPerna, Walter Martin's attorney. Mr. LaPerna substantiated that Walter Martin had twice sought to petition for divorce during his brief marriage to petitioner. This dated back to December 1982, and again on July 19, 1983 (R. 342, 344).

The State submits that it was as a direct result of this unhappy marriage and the fact that the victim wanted a divorce, further established by the threats of petitioner, that ultimately led to the murder of decedent by petitioner.

The events of July 21, 1983:

According to the written statement of petitioner, in the early morning hours of July 21, 1983, she went upstairs, got a gun, and went into the kitchen where Walter Martin was sitting. Walter Martin was coming towards her, and she shot him, causing his death (R. 361-362). The petitioner claimed she shot him in self-defense. The jury, after being presented with the physical evidence of this case, rejected this claim of self-defense and found petitioner guilty of Aggravated murder.

Sadie Martin, the roommate of Delores Williams, testified that prior to the killing, at approximately 9:00 in the morning, Walter Martin called his daughter. She spoke to Mr. Martin several minutes before informing Delores her father was on the line. Sadie Martin came back to the phone to tell him Delores would return his call. She heard petitioner over the phone yell, "Dirty—" and five or six subsequent gunshots in rapid succession. The phone dropped at the other end of the line (R. 1720).

The Emergency Medical Services were the first to arrive at the murder scene (R. 87). The petitioner testified that she first called her attorney, who advised her to call the police (R. 445). Mr. Roman Black of the Cleveland Emergency Medical Service testified to receiving the broadcast at 9:44 a.m., and arriving at the scene ten minutes later (R. 86). A woman let him in, whereupon he found a male lying on the kitchen floor (R. 87-88). The woman, dressed in a robe with curlers in her hair, appeared calm (R. 96). As to the condition of the body, there was a large amount of coagulated blood nearby (R. 90), and the victim was dead (R. 89, 109).

The police arrived at the scene at approximately 9:50 a.m. (R. 112). Terry Hageman, a patrolman for the City of Cleveland, testified that he and his partner were told by petitioner that she had shot her husband (R. 114). She told them where to find the gun used to kill the victim (R. 122, 123). Upon checking the gun, it appeared to have spent bullets (R. 124). They observed the body lying on the floor, next to a phone jack on the floor board (R. 114-116). There was a telephone on the wall above the jack (R. 117).

Detective Pollutro of the Cleveland Police Department Scientific Investigation Unit testified to receiving the fire-

arm from Detective Taliaferro (R. 145). The weapon was tested for trigger pull (R. 147). Detective Pollutro was asked to determine whether the morgue pellets, removed from the decedent, were fired from this particular gun. The comparison test established that this gun could have fired the bullets causing the victim's death (R. 150-151).

The State presented two witnesses from the Cuyahoga County Coroner's Office. Dr. Robert Challener, an expert in forensic, anatomical and clinical pathology, gave the following testimony (R. 37). His observations showed the victim received three gunshot wounds. He concluded the gunshot wound entering the trunk area would have been fatal even if it was the only shot fired (R. 47-48). He also opined that the gun shot wound to the chest had been fired from a distance of two feet or beyond (R. 39-42). No drugs or alcohol were found in the victim's body (R. 51-52).

Sharon Rosenberg, a trace evidence technician for the Cuyahoga County Coroner's Office, testified to the results of trace metal detection and gunshot residue tests performed on the decedent's body and clothing (R. 67-70). She testified there was no evidence of metal on the victim's hands to indicate that he recently had contact with a metal object such as a gun (R. 72). The probable distance from which the murder weapon was fired was beyond two to three feet (R. 74-75). Her testimony corroborated that of Dr. Challener's testimony.

The petitioner was the sole witness for the defense. According to her testimony, in the early hours of July 21, 1983, she and the victim fought over grocery money (R. 441). She claims that the victim hit her (R. 441). Later, she went upstairs, washed and rolled her hair, and put on a duster (R. 441-442). Petitioner then went into the bedroom and got a gun (R. 442). She intended to

hide it in the kitchen where the victim was sitting (R. 442-443). Before she could do so, the victim questioned her as to what she had in her hands (R. 443). She then shot him (R. 443), six times.

Defense counsel sought to establish a defense of self-defense. Defense counsel elicited from petitioner a prior incident concerning an alleged pistol-whipping petitioner allegedly received from the victim some three months before the killing (R. 432).

The defense counsel requested jury instructions on self-defense and the trial court complied (R. 699-704).

SUMMARY OF THE ARGUMENTS

Ohio's affirmative defense of self-defense does not violate due process as construed by this Court in *In re Winship*, 397 U.S. 358 (1970); *Mullaney v. Wilbur*, 421 U.S. 684 (1975); *Patterson v. New York*, 432 U.S. 197 (1977); and *McMillan v. Pennsylvania*, ... U.S. ..... (1986). Affirmative defenses, in general, are not prohibited by the Constitution. Ohio's affirmative defense of self-defense is not violative of due process where the affirmative defense constitutes a separate issue and does not serve to negate any facts of the crime which the State of Ohio has the burden of proving beyond a reasonable doubt.

Indeed, *Patterson* has expressly held that the Due Process Clause does not require a State, in a criminal trial, to disprove beyond a reasonable doubt every fact constituting any and all affirmative defenses relating to the culpability of an accused. We would ask this Court to apply the principles set forth in *Patterson* to the Ohio law on self-defense. Specifically, *Patterson* recognizes that States are given great latitude to regulate their criminal

procedures, define elements of crimes, and allocate the burden of persuasion as they see fit unless the procedures offend due process. We submit that Ohio's law on self-defense and its placing the burden of persuasion for that defense on the accused does not violate due process.

In Ohio, the burden of proof in all prosecutions is, at all times, on the State to prove the elements of the crime charged beyond a reasonable doubt. For example, in the present case, the jury was instructed:

> The plea of not guilty as so tendered by the defendant, has, as a matter of law, the effect of placing upon the shoulders of the State of Ohio the burden of proving beyond a reasonable doubt the existence of each and every material allegation and averment of the indictment. (Joint Appendix at 6).

Similarly, the Ohio statute satisfies the *Winship* rule that the reasonable doubt standard applies to every fact necessary to constitute the crime with which the defendant is charged, and that an accused is presumed innocent. The trial court explained to the jury the instructions with respect to the presumption of innocence as follows:

> The plea of not guilty entered by the defendant, as a matter of law, has a further effect; such plea clothes the defendant with the *legal presumption of innocence. This presumption of innocence is not a mere matter of form, but* [677] *rather is a shield which the law throws about the defendant.*
>
> This presumption of innocence is afforded the defendant as he enters upon the trial and remains with the defendant throughout the entire trial and during the examination into every fact and proposition to be proven by evidence by the State. This presumption

of innocence is only overcome or overthrown when you, as a jury, find the proof is such as to exclude every reasonable doubt of the guilt of the defendant.

Ohio Revised Code Section 2901.05, effective January 1st, 1974 provides:

Every person accused of an offense is presumed innocent until proven guilty beyond a reasonable doubt and the burden of proof is upon the prosecution. (Emphasis added, Joint Appendix, at 6, 7).

We would urge this Court to reaffirm the principles established in *Leland v. Oregon*, 343 U.S. 790 (1952), and *Rivera v. Delaware*, 429 U.S. 877 (1976) upholding statutory placement for the burden of proving insanity upon the accused. *Leland* rejected a constitutional challenge against an Oregon statute which required the defendant to proved insanity beyond a reasonable doubt. More recently, *Rivera* upheld a Delaware statute which required the defendant to prove that defense by a preponderance of the evidence. The Ohio self-defense law places less of a burden upon a defendant than does the defense of insanity, since self-defense justifies the crime charged, and does not require the use of expert testimony. The Ohio self-defense law satisfies due process requirements more clearly than those statutes found constitutional in *Leland* and *Rivera*.

We urge this Court to uphold Ohio's affirmative defense law of self-defense as not being in violation of due process standards.

ARGUMENT

THE DUE PROCESS CLAUSE OF THE UNITED STATES CONSTITUTION IS NOT VIOLATED WHERE THE OHIO LEGISLATURE PLACES THE BURDEN OF PROOF UPON A DEFENDANT TO ESTABLISH THE AFFIRMATIVE DEFENSE OF SELF-DEFENSE BY A PREPONDERANCE OF THE EVIDENCE.

The Petitioner's initial contention is one with which the Respondent wholeheartedly agrees, that is, the Due Process Clause protects an accused against conviction except upon proof beyond a reasonable doubt of every fact necessary to constitute the crime with which he is charged. *In re Winship*, 397 U.S. 358, 364 (1970). This fundamental concept is firmly rooted in our jurisprudence, and contrary to the Petitioner's arguments Ohio law on self-defense preserves this concept inviolate.

The Petitioner's argument is essentially that Ohio's law on self-defense is unconstitutional in placing the burden of proof on an accused since by asserting self-defense, an accused necessarily negates the "elements" of criminal intent and unlawfulness. Therefore, Petitioner argues, an accused must prove his innocence by disproving these elements of the crime.

The Petitioner's arguments are a product of a failure to understand the nature of self-defense in Ohio and a failure to acknowledge controlling case law, both of which conclusively establish that these arguments are groundless and accordingly should be rejected by this Honorable Court.

A. Ohio's Law on the Affirmative Defense of Self-Defense Does Not Violate Due Process Where the Affirmative Defense Constitutes a Separate Issue and Does Not Serve to Negate Any Facts of the Crime Which the State Has the Burden of Proving Beyond a Reasonable Doubt in Order to Convict.

Ohio Revised Code Section 2901.05(A) provides:

Ohio Revised Code Section 2901.05 Burden and Degree of Proof

(A) Every person accused of an offense is presumed innocent until proven guilty beyond a reasonable doubt, and the burden of proof for all elements of the offense is upon the prosecution. The burden of going forward with the evidence of an affirmative defense, and the burden of proof, by a preponderance of the evidence, for an affirmative defense is upon the accused.

Prior to the enactment of Revised Code Section 2901.05, effective November 1, 1978, the Ohio legislature enacted a law that with respect to all affirmative defenses a defendant has only the burden of going forward with evidence of a nature and quality sufficient to raise the defense and does not have the burden of establishing such defenses by a preponderance of the evidence. *See, State v. Robinson*, 47 Ohio St. 2d 103 (1976); and *State v. Humphries*, 51 Ohio St. 2d 95 (1977). This approach was a complete departure from the traditional Ohio rule that self-defense must be proven by the defendant by a preponderance of the evidence. *State v. Robinson, supra* at 110.

In 1978, the Ohio legislature changed the law to conform to the very sound reasons underlying the previous Ohio rule. The change in the law undoubtedly came about

as a result of the legislature's desire to prevent sham claims of such affirmative defenses as self-defense.

Several justifications exist for the traditional common law rule that the defendant bear the burden of proving affirmative defenses. First, affirmative defenses are considered to be a matter separate from the elements of a crime. They are a matter of exception, not negation. Second, a defendant is in a position superior to the prosecution to know and provide evidence concerning the circumstances of the affirmative defense he asserts.

The petitioner was indicted for Aggravated murder as defined in Ohio Revised Code Section 2903.01(A): "No person shall purposely, and with prior calculation and design, cause the death of another." The State of Ohio had the burden of proving beyond a reasonable doubt these three essential elements of the crime, i.e., purposely, prior calculation and design, and caused the death of another.

Ohio Revised Code Section 2901.05(C)(2) defines an affirmative defense as "[a] defense involving an excuse or justification peculiarly within the knowledge of the accused, on which he can fairly be required to adduce supporting evidence."

Ohio law has determined that self-defense is an affirmative defense in that it is a justification for otherwise illegal conduct. *See, State v. Nolton*, 19 Ohio St. 2d 133 (1969); and *State v. Poole*, 33 Ohio St. 2d 18 (1973).

The Ohio Supreme Court in *State v. Poole*, *supra*, at 19, characterized affirmative defenses as "justification(s) for admitted conduct." The Court continued by stating that an affirmative defense is not a mere denial or contradiction of the prosecution's evidence but is rather a

substantive or independent matter under which an accused claims exemption from liability "even if it is conceded that the facts claimed by the prosecution are true." *Id.* The affirmative defense of self-defense has been characterized as being in the nature of a confession and avoidance, by which an accused admits the existence of facts which "tend to establish the elements of the crime." *State v. Davis,* 8 Ohio App. 3d 205, 209 (1982).

Most recently, in our present case, *State v. Martin,* 21 Ohio St. 3d 91, 94 (1986), the Ohio Supreme Court reemphasized that an accused who seeks to rely on self-defense actually admits that he committed the act but seeks to justify his conduct on an independent basis.

By asserting self-defense, an accused does not necessarily admit the elements of the crime. Rather, an accused admits doing the act and at the same time advances a theory as to why he was justified in doing the act.

The Sixth Circuit Court of Appeals in *Thomas v. Arn,* 704 F.2d 865 (6th Cir., 1983), discussed the nature of Ohio's affirmative defenses. The definition of affirmative defenses set out in Ohio Revised Code Section 2901.05 (C)(2) does not refer to negations of elements of crimes. Instead, the use of the terms "excuse" and "justification" implies that a criminal offense has been committed, that is, that all of the elements of the crime have been proved beyond a reasonable doubt. 704 F.2d at 877. The affirmative defense is a separate issue raised only after the prosecution has established the elements of the crime beyond a reasonable doubt. *Id.* at 878.

Ohio law provides that a defendant must establish the following three facts to prevail on the claim of self-defense: (1) He was not at fault in creating the situation

giving rise to the affray; (2) He had a bona fide belief that he was in imminent danger of death or great bodily harm, and that his only means of escape from such danger was in the use of such force; and (3) He did not violate any duty to retreat or avoid the danger. *State v. Robbins*, 58 Ohio St. 2d 74, 79-80 (1979); *State v. Melchior*, 56 Ohio St. 2d 15, 20-21 (1978).

The elements necessary to establish self-defense are such that the burden should naturally fall upon a defendant since the nature of the defense is very subjective. The jury was charged in accordance with Ohio law that they were to put themselves in the place of the defendant to determine whether the defendant had reasonable grounds to believe that she was in imminent danger. Joint Appendix at 20. A defendant is certainly in a far better position that the State to produce evidence as to which his or her beliefs were at the time of the crime. To place this burden upon the State would encourage those criminally charged to raise the self-defense issue fatuously and to challenge the State to disprove it beyond a reasonable doubt.

This is especially made clear in the case *sub judice* in that the Petitioner testified at trial that she feared for her life because the victim struck her prior to the fatal shooting. This, then, was a matter peculiarly within her knowledge upon which it was fair to require her to come forward with evidence to support her claim of self-defense.

The Petitioner's claim that she acted in self-defense does not negate any of the elements upon which the Respondent relied to prove the crime of Aggravated murder. Specifically, as indicated by the statutory language, the crime of Aggravated murder contains three elements which must be proved by the State beyond a reasonable

doubt: (1) purposely; (2) prior calculation and design; and (3) cause the death of another. Ohio Revised Code Section 2903.01.

None of the three above-mentioned elements are negated by the defendant's utilization of the affirmative defense of self-defense. In a remarkably similar case, the Sixth Circuit Court of Appeals in *White v. Arn*, 788 F.2d 338 (6th Cir., 1986), specifically analyzed the elements of Ohio's murder statute, in accordance with this Court's ruling in *Patterson v. New York*, 432 U.S. 197 (1977), and concluded that the elements of purposely and causing the death of another were not negated by a claim of self-defense:

> Having determined the elements of murder as defined by statute, we next turn to the second inquiry in the *Patterson* analysis, whether self-defense negates either of the elements. We conclude that it does not. The defense has been described as being "in the nature of a confession and avoidance, by which a defendant essentially admits the existence of facts which tend to establish the elements of the crime. *Davis*, 8 Ohio App. 3d at 209, 456 N.E.2d 1256. When a defendant asserts the defense of self-defense in a murder trial, the defendant does not dispute or negate the elements of "purposely" or "cause the death of another." Rather, the defendant solely seeks to establish the elements of self-defense, which are unrelated to the elements of murder. *See Isaac v. Engle*, 646 F. 2d 1129, 1139 (6th Cir., 1980) (*en banc*) (Lively J., dissenting), *rev'd*, 456 U.S. 107, 102 S. Ct. 1558, 71 L.Ed. 2d 783 (1982). (The defense of self-defense "admits the facts claimed by the prosecution to establish an offense, but relies on the existence of a separate set

> of facts or circumstances which the law recognizes as an excuse. When established, this excuse exempts the defendant from liability."). The elements which must be shown to establish self-defense are: 1) the slayer was not at fault in creating the situation giving rise to the affray, . . . 2) the slayer has a bona fide belief that he was in imminent danger of death or great bodily harm and that his only means of escape from such danger was in the use of such force, . . . and 3) the slayer must not have violated any duty to retreat or avoid the danger." *State v. Robbins*, 58 Ohio St. 2d 74, 79-80, 388 N.E.2d 755 (1979). Since the defense of self-defense does not negate either of the statutory elements of murder, it appears that Ohio did not violate the Due Process Clause by requiring White, pursuant to Ohio Revised Code Section 2901.05 (A), to prove her defense of self-defense by a preponderance of the evidence.

With respect to the element of prior calculation and design, the jury was instructed in accordance with the following instruction:

> Prior calculation and design means the purpose to kill was reached by the defendant through a definite process of reasoning in advance of the killing, which process of reasoning must have included a mental plan, involving studied consideration of the method and the means with which to kill another, or the instrument or weapon used to kill another.
>
> No definite period of time must elapse and no particular amount of consideration must be given to the prior calculation and design to kill.
>
> Acting on the spur of the moment or after momentary consideration of the purpose to kill is not sufficient

> to constitute the kind of prior calculation and design required for [691] aggravated murder.
>
> In determining the element of prior calculation and design, if you find that the State has proved beyond a reasonable doubt that the Defendant actually formed a purpose to kill and that her purpose was arrived at with prior calculation and design before she performed the act, that is sufficient for this element of aggravated murder.

(Joint Appendix, at 14); *See also State v. Pierce,* 64 Ohio St. 2d 281 (1980); *State v. Cotton,* 56 Ohio St. 2d 8 (1978).

To require a defendant to establish that he was in imminent danger of death or great bodily harm does not negate the prosecution's burden to prove he acted with prior calculation and design. These separate factual determinations are matters for the jury's consideration. For example, take the situation where the accused receives a telephone call from the victim who indicates that he will arrive to kill the accused. Meanwhile, the accused secures a weapon and takes other measures to protect himself. When the victim arrives, a confrontation occurs and the accused kills the victim claiming self-defense. The accused may well have acted with prior calculation and design or killed in self-defense. Again, these separate factual determinations are matters for the jury consideration.

In the present case, the question whether or not Petitioner acted with prior calculation and design or killed in self-defense was for the jury to resolve. The jury rejected Petitioner's self-defense claim and concluded that the State had proven that Earline Martin acted with prior calculation and design in the murder of her husband.

In addition, Petitioner claims that criminal intent and unlawfulness are elements of the crime of Aggravated murder.

In *White v. Arn, supra,* the court considered and rejected virtually identical claims and arguments on Ohio's self-defense law presented for decision before this Court.

With respect to the Petitioner's argument that criminal intent is an element of the crime of Murder, the federal appellate court addressed the issue by stating:

> White next argues that self-defense negates the element of criminal intent. White asserts that this element, a "blameworthy" or "guilty" state of mind, must be established under Ohio criminal law in order for an act to be criminally punishable. We addressed this same argument and the same asserted case authority in *Thomas.* As we observed in *Thomas,* the "guilty" and "blameworthy" states of mind required to convict an accused are specified in Ohio Revised Code Section 2901.22, which defines the mental elements of purposely, knowingly, recklessly and negligently. *Thomas,* 704 F.2d at 876 n. 14. By these specific definitions, the Ohio Legislature has supplanted the common law notions of *mens rea. Id.* Thus, in each crime in Ohio the requisite criminal intent is expressly provided and is not merely a general element of "blameworthiness." The criminal intent element of murder is "purposely," and, as we stated previously, proving self-defense does not negate this element. *See id.* ("Although a person claiming to have acted in self-defense may not literally have a 'guilty' or 'blameworthy' state of mind, he may very well have knowledge of the probable results of his actions, and this mental state is sufficient to convict for aggravated assault."). 788 F.2d at 346.

Petitioner also asserts that unlawfulness is an element of all Ohio crimes. The federal court in *White v. Arn, supra,* also addressed this assertion and concluded that unlawfulness was not an element. The federal court reasoned:

> White lastly argues that unlawfulness is an element of all Ohio crimes and that self-defense negates this element. This argument, and the cases which purportedly support it, has been rejected repeatedly. *See Carter,* 637 F.2d at 456 n. 6; *Thomas,* 704 F.2d at 876-77; *State v. Morris,* 8 Ohio App. 3d 12, 18-19 (1982). The Ohio appellate court in *Morris* explained its decision thusly:
>
> > Once the prosecution has proven each element of felonious assault, the prosecution has proven the unlawfulness of defendant's acts. When the accused asserts an affirmative defense as a justification for an otherwise unlawful act, the burden of proving that justification can be constitutionally assigned to the accused. . . A contrary ruling would mean that the state is constitutionally required to disprove every affirmative defense, since every defense is a justification for the conduct involved which causes that conduct to be "lawful."
>
> 8 Ohio App. 3d at 18-19 (citations omitted). We find this reasoning persuasive and conclude that unlawfulness is not an element of murder in Ohio and therefore self-defense does not negate unlawfulness. (*Id.* at 346-47).

The same court addressed White's as well as the Amicus' contentions raised herein that Ohio's murder statutes also contained the elements of criminal conduct, voluntariness and that the Ohio indictments allege acts that

are against the peace and dignity of the State of Ohio. The *White v. Arn* court summarily rejected these contentions by stating:

> White argues that criminal conduct is an element of murder and that the defense of self-defense negates this element since it establishes that the conduct was non-criminal in nature. We rejected the same argument with respect to the crime of aggravated assault in *Thomas v. Arn*, 704 F.2d 865, 875 (6th Cir., 1983). Even though the crime at issue in *Thomas* was aggravated assault, Ohio Revised Code Section 2903.12, that case is completely applicable here. White contends that the five additional elements, including criminal conduct are elements of *all* Ohio crimes. Since we have already decided that criminal conduct is not an element of aggravated assault, we must also conclude that it is not an element of murder. Accordingly, we reject White's argument to the contrary. . .
>
> * * *
>
> White next argues that "voluntariness" is an element of murder which is negated by self-defense. White observes that Ohio Revised Code Section 2901.21 imposes the requirement that an act be voluntary in order to impose criminal liability. White contends that an act of self-defense is more of a reflex action than a voluntary one, citing *State v. Hardy*, 60 Ohio App. 2d 325, 329 (1978), and therefore concludes that self-defense negates the voluntary act element of murder. We rejected the same argument, which was based on the same case authority, in *Thomas*. As we observed in *Thomas*, Ohio defines what constitutes a voluntary act by stating which acts are involuntary. Section 2901.21(C) provides that "[r]eflexes, convulsions,

> body movements during unconsciousness or sleep, and body movements that are not otherwise a product of the actors volition, are involuntary acts." In light of these examples of involuntary acts, we conclude, as we did in *Thomas*, that an act in self-defense is not an involuntary act and therefore does not negate the voluntary act requirement. *Thomas*, 704 F.2d at 876.
>
> * * *
>
> White next argues that self-defense negates the Ohio constitutional requirement that all indictments allege that the acts complained of were "against the Peace and Dignity of the State of Ohio." Ohio Constitution art. IV §20. White contends that an act in self-defense is not illegal and therefore cannot be against the "peace and dignity" of the State. White cites no cases which support the proposition that this is an element of every crime which must be established by the prosecution, however, and accordingly we reject this argument as we did in *Thomas*. 704 F.2d at 876 n. 15.

Therefore, after a careful scrutiny, the Court properly concluded that the above-mentioned claimed elements are not, in reality, elements of the crime charged which the State must prove beyond a reasonable doubt.

Other federal and state cases have similarly rejected the identical arguments disposed of in *White v. Arn, supra*. *See, Thomas v. Arn* 704 F.2d 865, 876-77 (6th Cir., 1983); *Carter v. Jago*, 637 F.2d 449, 456 (6th Cir., 1980), *certiorari denied*, 456 U.S. 980 (1982), and *State v. Morris*, 8 Ohio App. 3d 12 (1982).

The rationale employed by the *Morris* court is essentially that once the prosecution has proven each element of the crime, it has proven the unlawfulness of the defendant's acts. An affirmative defense is a justification

for an otherwise unlawful act. The burden of proving this justification can be constitutionally assigned to an accused. "A contrary ruling would mean that the State is constitutionally required to disprove every affirmative defense, since every defense is a justification for the conduct involved which causes that conduct to be 'lawful' ". 8 Ohio App. 3d at 19.

A second and separate panel of the Sixth Circuit in *Wilson v. McMacken,* 786 F.2d 216 (6th Cir., 1986), recognized the viability of *Carter v. Jago, supra* and *State v. Martin, supra,* when it reaffirmed the principle that it does not violate due process to require a defendant to prove self-defense by a preponderance of the evidence. 786 F.2d at 219.

In the case *sub judice,* the Due Process Clause has not been violated since Ohio's scheme does not reallocate or reduce the State's burden to prove each essential element of the crime with which the accused has been charged.

As the Ohio Supreme Court recognized, the State proved beyond a reasonable doubt that the Petitioner purposely and with prior calculation and design caused the death of her husband. *State v. Martin, supra* at 94. Based upon the facts, the jury could have concluded that the Petitioner either acted with or without prior calculation and design; it also could have believed or disbelieved her claim of self-defense.

Thus, placing the burden on the Petitioner that she acted in self-defense in that she was in imminent danger of death or bodily harm did not negate the State's burden of proof that she acted with purpose and prior calculation and design.

B. The Due Process Clause of the Fourteenth Amendment Does Not Require a State, in a Criminal Trial, to Disprove Beyond a Reasonable Doubt Every Fact Constituting Any and All Affirmative Defenses Related to the Culpability of an Accused.

The State of Ohio asserts that this Court's prior decisions do not require the State to disprove the affirmative defense of self-defense. Our discussion begins with the case of *In re Winship*, 397 U.S. 358 (1970).

In that case, this Court considered a New York rule permitting an adjudication of juvenile delinquency on a mere preponderance of the evidence. In finding that rule unconstitutional, this Court held that "the Due Process Clause protects the accused against conviction except upon proof beyond a reasonable doubt of every fact necessary to constitute the crime with which he is charged." 397 U.S. at 364.

The basis of the *Winship* holding is to protect the concept of the presumption of innocence since proof beyond a reasonable doubt was a necessary corollary of the presumption of innocence.

Five years later, in *Mullaney v. Wilbur*, 421 U.S. 684 (1975), this Court was confronted with a situation wherein the State of Maine placed the burden of proof on the defendant to disprove an element of the crime. *Mullaney* involved a homicide prosecution in Maine, where the statute recognized murder and manslaughter as the only two types of homicide. The trial judge then instructed the jury that the elements of murder and manslaughter were identical except that murder required a

finding of malice aforethought, an element not required for manslaughter. Thereafter, the jury was instructed that once the prosecution established the common elements of murder and manslaughter, malice was to be presumed unless the defendant was able to prove by a preponderance of the evidence that he acted in the heat of passion upon sudden provocation. Thus, once the defendant was shown to have committed a homicide, he was presumed guilty of murder unless he proved he acted in the heat of passion. In essence, the State did not have to prove malice which was an essential element of the crime of murder. The defendant, in reality was forced to disprove an established element of the murder offense. This violated due process under the *Winship* rationale.

Shortly thereafter, this Court enunciated the current controlling law concerning the issue of the burden of proof with respect to affirmative defenses. This case, of course, was *Patterson v. New York, supra.*

In *Patterson*, this Court considered a New York murder statute similar to the statute in *Mullaney* which dispensed with the prosecution's need to prove malice. The murder offense in New York required as *mens rea* only an intent to kill. Malice was not an element of the crime. Instead, the New York law provided an affirmative defense if the defendant proved he acted while subject to an "extreme emotional disturbance." If successful, the offense would be reduced to manslaughter. The *Patterson* Court concluded that the statutory scheme in New York, rather than negating any elements of murder permitted the defendant to introduce a mitigating factor which reduced his culpability. Thus, the *Winship* rationale had been satisfied in that the prosecution was required to prove

every element necessary to constitute the crime charged against the defendant. *Patterson* is distinguished from *Mullaney* on the basis that the Maine statute in *Mullaney,* by requiring the defendant to prove an alleged defense, created a presumption that dispensed with the prosecution's need to prove an essential element of the crime. The New York statute in *Patterson* involved no presumption. Taken together, *Mullaney* and *Patterson* establish that the prosecution may not shift to the defendant the burden of persuasion on any issue of fact which, if proved, negates an essential element of the offense with which a defendant is charged. *Patterson* limits the *Winship* doctrine to the essential elements of the offense. *Patterson* states that the courts must determine whether a defense actually negates an element of the crime, and if it does, to require the State to disprove the defense.

The Petitioner impliedly recognizes the strength of the *Patterson* decision to support Ohio's position by unsuccessfully attempting to distinguish its only too manifest applicability to the present case.

The persuasive impact of *Patterson's* rationale and its holding as it applies to the instant case cannot be overemphasized as *both* cases involved affirmative defenses which went to a reduction in crime or a complete justification for crime, the burden of proof being on the defendant by a preponderance of the evidence. In *both* cases, the defendant claimed that their defenses negated an element of the prosecution's case.

Contrary to the Petitioner's myopic reading of *Patterson*, the decision does not deal merely with defenses of mitigation which go to the degree of crime as opposed to self-defense which is a justification for crime.

The *Patterson* Court began by recognizing that at common law, the burden of proving affirmative defenses was placed on the defendant. 432 U.S. at 202.

Much of the *Patterson* decision was based upon the Court's two previous decisions dealing with the affirmative defense of insanity, *Leland v. Oregon*, 343 U.S. 790 (1952) and *Rivera v. Delaware*, 429 U.S. 877 (1976).

The Court in *Leland* upheld an Oregon rule which required a defendant to prove his insanity beyond a reasonable doubt. The *Patterson* Court reiterated the *Leland* rationale that the Oregon scheme mandated that the State prove all the elements of the crime beyond a reasonable doubt. *Id.* at 204. The continuing validity of this doctrine was confirmed in *Rivera v. Delaware*, where Delaware's scheme which placed the burden of proof by a preponderance of the evidence on the accused to prove insanity came under attack, once again, and the Court dismissed the appear for not presenting a substantial federal question.

The fact that the issue presently before this Court is self-defense, which serves as a justification for crime, as opposed to mitigation with respect to the degree of crime, is a distinction without a difference.

In giving its imprimatur to New York's law, the *Patterson* Court discussed the pattern established in both Oregon's and New York's laws. Once the facts constituting a crime are established beyond a reasonable doubt, then based on all the evidence, including that going to the defendant's mental state, a state may refuse to sustain an affirmative defense unless the defendant has met his burden. 432 U.S. at 206.

The Court found that the defendant's assertion that he acted under extreme emotional distress "does not serve to negative any facts of the crime which the State is to prove in order to convict of murder." *Id.* at 207. Rather, it is a separate issue upon which a defendant may properly be required to carry a burden.

Contrary to the petitioner's assertion, the *Patterson* Court discussed affirmative defenses that both mitigate or exculpate and concluded that the Due Process Clause does not mandate that New York either abandon these defenses or disprove their existence. 437 U.S. at 207-208.

The Court continued:

> We thus decline to adopt as a constitutional imperative, operative country wide, that a State must disprove beyond a reasonable doubt every fact constituting any and all affirmative defenses related to the culpability of an accused. . . .
>
> . . . We therefore will not disturb the balance struck in previous cases holding that the Due Process Clause requires the prosecution to prove beyond a reasonable doubt all of the elements included in the definition of the offense of which the defendant is charged. Proof of the nonexistence of all affirmative defenses has never been constitutionally required; and we perceive no reason to fashion such a rule in this case and apply it to the statutory defense at issue here. 432 U.S. at 210.

Thus, Ohio asserts that the *Patterson* doctrine does not require the State to disprove the affirmative defense of self-defense.

C. A State Legislature May Regulate Procedures As Well As Define Elements of Crimes Without Violating the Due Process Clause of the Fourteenth Amendment Unless It Offends Some Principle of Justice So Deeply Rooted in the Traditions and Conscience of Our People As to Be Ranked As Fundamental.

It is axiomatic that the states under our federal system have the principal responsibility for defining and prosecuting crimes. *See, Abbate v. United States,* 359 U.S. 187 (1959). Although the Fourteenth Amendment does not change the distribution of powers between the states and the federal government so as to withdraw the basic interest of criminal justice from the exclusive control of the states, it does impose restrictions upon the states in making and enforcing its criminal laws. *See, Knapp v. Schweitzer,* 357 U.S. 371 (1958).

The State of Ohio has not exceeded the constitutional restrictions in enacting a statutory scheme in requiring a defendant to bear the burden of persuasion by a preponderance of the evidence on the affirmative defense of self-defense.

The *Patterson* Court stated that there are constitutional limits beyond which the states may not go and cited as examples that a legislature may not declare an individual guilty or presumptively guilty of a crime. Also, a legislature cannot validly declare that mere proof of the identity of an accused creates a presumption of the existence of facts essential to a finding of guilt. 432 U.S. at 210.

In fact, the *Patterson* decision affords states considerable latitude in the establishment of their criminal procedures. For example:

> If the State nevertheless chooses to recognize a factor that mitigates the degree of criminality or punishment, we think the State may assure itself that the fact has been established with reasonable certainty. To recognize at all a mitigating circumstance does not require the State to prove its nonexistence in each case in which the fact is put in issue, *if in its judgment this would be too cumbersome, too expensive, and too inaccurate.* (Emphasis added, at 209).

This principle was recently recognized in *McMillan v. Pennsylvania*, ... U.S. ..... (1986). There the Court recognized that it has never attempted to define what these constitutional limits are, specifically, the extent to which due process forbids the reallocation or reduction of burdens of proof in criminal cases.

The Court in *McMillan* held that the State of Pennsylvania may properly treat visible possession of a firearm as a sentencing consideration rather than as an element of an offense that must be proved beyond a reasonable doubt. In so holding, this Court rejected the Petitioner's claims that the Due Process Clause as interpreted in *Winship* and *Mullaney* mandates that a State prove visible possession of a firearm beyond a reasonable doubt.

This Court found *Patterson* to be controlling. It stated: "*Patterson* stressed that in determining what facts must be proved beyond a reasonable doubt, *the State legislature's definition of the elements of the offense is usually dispositive. . .*". (Emphasis added). The Court gave proper deference to the Pennsylvania legislature's decision not to include visible possession of a firearm as an element of the crimes enumerated in the mandatory sentencing statute.

The Court then discussed the constitutional limits placed on a State in defining the elements of its crimes as was first mentioned in *Patterson*. The Court concluded that Pennsylvania's law did not transgress the limits set out in *Patterson*. Specifically, the law did not create a presumption of guilt as in *Mullaney*. Also, it did not relieve the prosecution of its burden of proving guilt.

Similarly, Ohio has not transgressed the limits set out in *Patterson*. Ohio law does not create a presumption of guilt. The jury was instructed that the presumption of innocence remains with the accused unless and until the prosecution meets its burden of proof beyond a reasonable doubt. (Joint Appendix at pp. 6-7). Nor does Ohio law on self-defense relieve the prosecution of its burden of proving each and every element of the offense charged beyond a reasonable doubt. (Joint Appendix at p. 6).

The *McMillan* Court also rejected the Petitioner's reliance on the fact that many legislatures have made possession of a weapon an element of various offenses. This fact alone does not render Pennsylvania's choice unconstitutional. The *Patterson* Court made a similar point when it stated: *"Nor does the fact that a majority of the states have now assumed the burden of disproving affirmative defenses—for whatever reasons—mean that those states that strike a different balance are in violation of the Constitution."* (Emphasis added). 432 U.S. at 211.

In the present case, the Petitioner's argument is essentially that the absence of self-defense must be an element of the Ohio crime of Aggravated murder. This position was apparently rejected by the majority in *Moran v. Ohio*, ... U.S. ....., 105 S. Ct. 350 (1984), If this position were correct, then it would necessarily follow that

the State would have to disprove self-defense existence beyond a reasonable doubt even in the case where a defendant does not raise it. Otherwise, the State would be in violation of the *Winship* doctrine that the prosecution must prove every element of the crime charged beyond a reasonable doubt. The illogical result of this premise is only too apparent.

Patterson discussed the affirmative defense of extreme emotional distress which applies with equal force in this situation:

> The State itself was unwilling to undertake to establish the absence of those facts beyond a reasonable doubt, perhaps fearing that proof would be too difficult and that too many persons deserving treatment as murderers would escape that punishment if the evidence need merely raise a reasonable doubt about the defendant's emotional state. 432 U.S. at 207.

Perhaps for this very reason this Court in *Leland v. Oregon*, *supra*, decided that a State need not bear the burden of disproving the affirmative defense of insanity beyond a reasonable doubt. The effect of this decision is that lack of insanity was not found to be an element of the offense.

In *Leland*, the Petitioner was charged with first degree murder which required the prosecution to prove premeditation, deliberation, malice and intent. Also, the jury was instructed that to constitute first degree murder, they must find that the defendant's plan to take life was formed in cold blood and not hastily upon the occasion. 343 U.S. at 794-95. The jury was then instructed that if they found the defendant's mental condition to be so affected or diseased that he was unable to formulate a plan or in-

tent to kill in cold blood, then the defendant has not committed a first degree murder. *Id.*

In the present case, the Petitioner's position is that to require a defendant to prove that he acted in self-defense negated the State's burden of proving that he acted purposely and with prior calculation and design.

In order to accept this position, this Court would have to agree that the defendant's burden in *Leland*, that he was unable to formulate the requisite state of mind, would serve to negate the prosecution's burden that he acted with premeditation, deliberation, and malice.

The Court rejected such a position and found that the burden remained on the State throughout the trial to prove the elements of the crime and that the issue of insanity was a *separate* issue set apart from the crime charged. 343 U.S. at 795-96.

Similarly in the instant case, the burden never shifted from the State to the Petitioner to prove that she acted purposely, with prior calculation and design in causing the death of her husband. The Petitioner merely had to carry the burden on the factual issues of self-defense, the existence of which was peculiarly within her knowledge. Moreover, it is important to note that the Ohio law of self-defense places less of a burden upon a defendant than does the issue of insanity. Self-defense justifies the crime charged, and does not require the use of expert testimony. If the statutes were found constitutional in *Leland* and *Rivera*, then the Ohio law on self-defense in the instant case certainly satisfies due process requirements.

The Sixth Circuit in *Carter v. Jago, supra*, discussed Ohio's treatment of self-defense as being in compliance with *Patterson* as follows:

> Allowing a State to treat self-defense as an affirmative defense is consistent with the concerns expressed in *Patterson* for allowing the legislative branch sufficient latitude to define mitigating factors that affect criminality. While forcing the State to disprove self-defense may be wise as a matter of policy, *Patterson* does not authorize judicial modification of a legislature's evidentiary standard in the absence of constitutional infirmities. 637 F.2d at 457, fn. 6.

The Petitioner raises several other arguments, that although lacking any semblance of merit, should be addressed.

First, Petitioner asserts that the right to act in self-defense is universally accepted in this country today and therefore, self-defense is thus elevated to a fundamental constitutional right. This simply is not true. Self-defense has never been recognized as a fundamental right neither in the United States Constitution nor in any existing case law. Nevertheless, the Court need not determine whether self-defense is a constitutionally protected right, since Ohio recognizes that justification for otherwise illegal conduct.

In this case, the Court need only decide whether Ohio can assign the burden of proving self-defense to the defendant. Additionally, this Court might well view the Petitioner's contention with alarm.

If self-defense is a constitutionally protected right, then every case involving a self-defense claim presents a federal constitutional issue. In that event, this Court would have to provide a uniform definition for self-defense which the states would have to follow. A more reasoned approach permits the states to define crimes and defenses as they determine.

The Petitioner relies on the following statement written by Justice Stevens in his dissenting opinion in *McMillan v. Pennsylvania*:

> It follows, I submit, that if a State provides that a specific component of a prohibited transaction shall give rise both to a special stigma and to a special punishment, that component must be treated as a "fact necessary to constitute the crime" within the meaning of our holding in *In re Winship*.

The Petitioner has attempted to use this principle to support her argument that the presence or absence of self-defense is a component of a crime that gives rise to a special stigma and to a special punishment. Therefore, Petitioner asserts it must be treated as a "fact necessary to constitute the crime," i.e., an element of the crime.

Not only is this argument based upon a tortured, improper reading of the entire *McMillan* decision, but it is patently incorrect.

As the State of Ohio has unequivocally demonstrated herein, the absence of self-defense is not a component of the crime of Aggravated murder. Similarly, it is not an element of the crime. The absence of self-defense is simply not a "fact necessary to constitute the crime." In the present case, the State of Ohio convinced a jury that Earline Martin killed her husband purposely and with prior calculation and design. The Petitioner failed to demonstrate to the satisfaction of the jury that she acted in self-defense.

Next, the Petitioner relies upon a law review article, Allen, *Mullaney v. Wilbur, The Supreme Court, and the Substantive Criminal Law—An Examination of the Limits of Legitimate Intervention*, 55 TEXAS L. REV. 269 (1977).

to support the argument that a State must prove beyond a reasonable doubt each fact necessary to make the punishment and stigma imposed proportional to the offense under the Eighth Amendment.

The Petitioner's argument is based on a "proportionality principle" which requires a State to prove "enough" to justify the imposition of the maximum sentence permissible under the statute.

Contrary to the Petitioner's representation, this Court in *Patterson* did *not* rely on this article to support the above-mentioned Eighth Amendment argument. The *Patterson* Court peripherally mentioned this article in a footnote in support of the following statement: "Other writers have recognized the need for flexibility in allocating the burden of proof in order to enhance the potential for liberal legislative reforms." 432 U.S. at 209, fn. 11. The *Patterson* Court did not even remotely give credence to the Petitioner's Eighth Amendment argument advanced herein.

And with good reason. Neither the United States Constitution nor any Court in this country known to the State of Ohio has advocated such a radical interpretation of the Eighth Amendment.

The primary concern of the drafters in writing the Eighth Amendment was to prevent torture and other barbarous methods of punishment. *Estelle v. Gamble*, 429 U.S. 97, 102 (1976). More recently, cases have decided that the Amendment embodies "broad and idealistic concepts of dignity, civilized standards, humanity, and decency . . ." against which penal measures must be evaluated. *Id.* citing *Jackson v. Bishop*, 404 F.2d 571, 579 (8th Cir., 1968). *See also, Gregg v. Georgia*, 428 U.S. 153, 169-173 (1976).

Therefore, the State of Ohio submits that the theory advanced by the Petitioner is unfounded in legal principle without support from any source.

The Petitioner also puts misplaced reliance on the decision of *Holloway v. McElroy*, 632 F.2d 605 (5th Cir., 1980). There the court found that a finding of self-defense negates the essential element of unlawfulness within the meaning of Georgia's murder and manslaughter statutes. The court decided that for the State of Georgia to meet its burden of proving the element of unlawfulness, it must prove beyond a reasonable doubt the absence of self-defense or justification. The Georgia statute differs markedly from Ohio law.

The Petitioner fails to acknowledge that the Georgia statute made unlawfulness an element of the crime. 632 F.2d at 628. In contrast, the Ohio statute of Aggravated murder does not make this an element of the crime. The importance of this fact was emphasized by the court when it included in its opinion a caveat that its holding was a narrow one which did not include within its scope crimes other than voluntary manslaughter as defined by Georgia law. 632 F.2d at 635.

CONCLUSION

In conclusion, Respondent contends that the Ohio affirmative defense of self-defense comports with basic concepts of due process. The decisions of this Court in *Winship, Mullaney, Patterson* and *McMillan*, require the State to bear the burden of proof beyond a reasonable doubt of every fact necessary to constitute the crime with which the defendant is charged. Ohio's law on self-defense satisfies this requirement. Moreover, Ohio's law satisfies and leaves intact the concept of the presumption of innocence.

We have demonstrated that the Due Process Clause does not prohibit the placing of the burden of proof upon the accused to establish an affirmative defense in justification of the crime charged. This is especially true under Ohio law where self-defense constitutes a separate issue and does not serve to negate any facts of the crime which Ohio has the burden of proving beyond a reasonable doubt.

Finally, Ohio's affirmative defense of self-defense does not exceed the permissible legislative limits that States enjoy in regulating their criminal procedures, defining the elements of their crimes and allocating the burden of persuasion.

Respectfully submitted,

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APPENDIX

CONSTITUTIONAL PROVISIONS

United States Constitution, Amend. XIV, § 1

AMENDMENT 14

SECTION 1

All persons born or naturalized in the United States, and subject to the jurisdiction thereof, are citizens of the United States and of the State wherein they reside. No State shall make or enforce any law which shall abridge the privileges or immunities of citizens of the United States; nor shall any State deprive any person of life, liberty, or property, without due process of law; nor deny to any person within its jurisdiction the equal protection of the laws.

Ohio Constitution

Article 1, § 1

§ 1 Inalienable rights.

All men are, by nature, free and independent, and have certain inalienable rights, among which are those of enjoying and defending life and liberty, acquiring, possessing, and protecting property, and seeking and obtaining happiness and safety.

STATUTES

Ohio Revised Code

§ 2903.01 Aggravated murder.

(A) No person shall purposely, and with prior calculation and design, cause the death of another.

(B) No person shall purposely cause the death of another while committing or attempting to commit, or while fleeing immediately after committing or attempting to commit kidnapping, rape, aggravated arson or arson, aggravated robbery or robbery, aggravated burglery or burglary, or escape.

(C) Whoever violates this section is guilty of aggravated murder, and shall be punished as provided in section 2929.02 of the Revised Code.

(D) No person shall be convicted of aggravated murder unless he is specifically found to have intended to cause the death of another. In no case shall a jury in an aggravated murder case be instructed in such a manner that it may believe that a person who commits or attempts to commit any offense listed in division (B) of this section is to be conclusively inferred, because he engaged in a common design with others to commit the offense by force and violence or because the offense and the manner of its commission would be likely to produce death, to have intended to cause the death of any person who is killed during the commission of, attempt to commit, or flight from the commission of or attempt to commit, the offense. If a jury in an aggravated murder case is instructed that a person who commits or attempts to commit any offense listed in division (B) of this section may be inferred, because he engaged in a common design with others to commit the offense by force or violence or because the offense and the manner of its commission would be likely to produce death, to have intended to cause the death of any person who is killed during the commission of, attempt to commit, or flight from the commission of or attempt to commit the offense, the jury also shall be instructed that the inference is nonconclusive, that the inference

may be considered in determining intent, that it is to consider all evidence introduced by the prosecution to indicate the person's intent and by the person to indicate his lack of intent in determining whether the person specifically intended to cause the death of the person killed, and that the prosecution must prove the specific intent of the person to have caused the death by proof beyond a reasonable doubt.

§ 2903.02 Murder.

(A) No person shall purposely cause the death of another.

(B) Whoever violates this section is guilty of murder, and shall be punished as provided in section 2929.02 of the Revised Code.

§ 2903.03 Voluntary manslaughter.

(A) No person, while under the influence of sudden passion or in a sudden fit of rage, either of which is brought on by serious provocation occasioned by the victim that is reasonably sufficient to incite the person into using deadly force, shall knowingly cause the death of another.

(B) Whoever violates this section is guilty of voluntary manslaughter, an aggravated felony of the first degree.

§ 2901.05 Burden and degree of proof.

(A) Every person accused of an offense is presumed innocent until proven guilty beyond a reasonable doubt, and the burden of proof for all elements of the offense is upon the prosecution. The burden of going forward with the evidence of an affirmative defense, and the bur-

den of proof, by a preponderance of the evidence, for an affirmative defense, is upon the accused.

(B) As part of its charge to the jury in a criminal case, the court shall read the definitions of "reasonable doubt" and "proof beyond a reasonable doubt," contained in division (D) of this section.

(C) As used in this section, an "affirmative defense" is either of the following:

(1) A defense expressly designated as affirmative;

(2) A defense involving an excuse or justification peculiarly within the knowledge of the accused, on which he can fairly be required to adduce supporting evidence.

(D) "Reasonable doubt" is present when the jurors, after they have carefully considered and compared all the evidence, cannot say they are firmly convinced of the truth of the charge. It is a doubt based on reason and common sense. Reasonble doubt is not mere possible doubt, because everything relating to human affairs or depending on moral evidence is open to some possible or imaginary doubt. "Proof beyond a reasonable doubt" is proof of such character that an ordinary person would be willing to rely and act upon it in the most important of his own affairs.

§ 2901.21 Requirements for criminal liability.

(A) Except as provided in division (B) of this section, a person is not guilty of an offense unless both of the following apply:

(1) His liability is based on conduct which includes either a voluntary act, or an omission to perform an act or duty which he is capable of performing;

(2) He has the requisite degree of culpability for each element as to which a culpable mental state is specified by the section defining the offense.

* * * * *

(C) As used in this section:

(1) Possession is a voluntary act if the possessor knowingly procured or received the thing possessed, or was aware of his control thereof for a sufficient time to have ended his possession.

(2) Reflexes, convulsions, body movements during unconsciousness or sleep, and body movements that are not otherwise a product of the actor's volition, are involuntary acts.

(3) "Culpability" means purpose, knowledge, recklessness, or negligence, as defined in section 2901.22 of the Revised Code.

§ 2901.22 Culpable mental states.

(A) A person acts purposely when it is his specific intention to cause a certain result, or, when the gist of the offense is a prohibition against conduct of a certain nature, regardless of what the offender intends to accomplish thereby, it is his specific intention to engage in conduct of that nature.

(B) A person acts knowingly, regardless of his purpose, when he is aware that his conduct will probably cause a certain result or will probably be of a certain nature. A person has knowledge of circumstances when he is aware that such circumstances probably exist.

(C) A person acts recklessly when, with heedless indifference to the consequences, he perversely disrgards a

known risk that his conduct is likely to cause a certain result or is likely to be of a certain nature. A person is reckless with respect to circumstances when, with heedless indifference to the consequences, he perversely disregards a known risk that such circumstances are likely to exist.

(D) A person acts negligently when, because of a substantial lapse from due care, he fails to perceive or avoid a risk that his conduct may cause a certain result or may be of a certain nature. A person is negligent with respect to circumstances when, because of a substantial lapse from due care, he fails to perceive or avoid a risk that such circumstances may exist.

(E) When the section defining an offense provides that negligence suffices to establish an element thereof, then recklessness, knowledge, or purpose is also sufficient culpability for such element. When recklessness suffices to establish an element of an offense, then knowledge or purpose is also sufficient culpability for such element. When knowledge suffices to establish an element of an offense, then purpose is also sufficient culpability for such element.